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SUPREME COURT, U.S.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,
Petitioner

v.

HOWARD LUTHER DICKERSON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

R. CLIFFORD FULFORD
FULFORD, POPE, NATTER, DONOVAN & MULLINS
2326 HIGHLAND AVENUE
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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
CONCLUSION	3
CERTIFICATE OF SERVICE	3

TABLE OF AUTHORITIES

Ayers v. Ciconne
431 F.2d 724 (8th Cir. 1970) 2

Singleton v. Wulff
428 U.S. 106 (1976) 2

United States ex rel Kellogg v. McBee
452 F.2d 134 (7th Cir. 1971) 2

SUMMARY OF THE ARGUMENT

A federal appellate court may supplement the record on appeal in order to fairly and efficiently dispose of the issues before it.

ARGUMENT

Petitioner asserts that there is a conflict between the Circuit Courts of Appeal as to whether a federal appellate court may supplement the record on appeal with evidence not before the federal district court. The two cases cited by Petitioner to support its argument that a federal appellate court may not so supplement the record are insufficient authority for Petitioner's assertion.

In U. S. ex rel Kellogg v. McBee, 452 F.2d 134 (7th Cir. 1971), the Court simply held that judicial review of the decision of a local administrative board is limited to the record made before the board, and that Rule 10(e) of the Federal Rules of Appellate Procedure was not sufficient authority for abrogating that well settled point of law. Ayers v. Ciconne, 431 F.2d 724 (8th Cir. 1970) is inapplicable to the issue before the Court. On a direct habeas appeal, the Court held that the appeal was moot in light of the fact that Appellant had not attacked the validity of the underlying conviction, and was no longer confined by Appellee.

Neither of the two noted cases, nor any other cited by Petitioner, states that it is beyond the power of a federal appellate court to supplement the record on appeal. In fact, no federal appellate court has disputed the holding of this Court in Singleton v. Wulff, 428 U.S. 106 (1976), that the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Court of Appeals. Accordingly, there is no conflict among the Circuit Courts of Appeal.

In the instant case the Eleventh Circuit undertook to review the state trial transcript upon which Respondent's original habeas petition had been based. It held that, as a matter of law, Respondent's right to compulsory process had been violated. To remand the case to the district court for an evidentiary hearing, as Petitioner asserts was necessary, would have been an exercise of futility and judicial inefficiency. The key point was not what testimony would have actually been elicited from the missing witness, but what Respondent had shown at the trial in order to warrant the continuance to procure such testimony. It is apparent, therefore, that Petitioner's arguments are without merit, and the Petition should be denied.

CONCLUSION

By virtue of the foregoing, Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully Submitted,

R. Clifford Fulford
R. CLIFFORD FULFORD

Mark E. Hoffman
MARK E. HOFFMAN

CERTIFICATE OF SERVICE

I, R. Clifford Fulford, attorney of record for Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 9th day of July, 1982, I did serve the requisite number of copies of the foregoing on the attorneys for the Petitioner, Charles A. Graddick and Elizabeth Ann Evans, by mailing same to them, first class postage prepaid and addressed as follows:

Charles A. Graddick
Elizabeth Ann Evans
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

R. Clifford Fulford
R. CLIFFORD FULFORD
Attorney for Respondent

Address of Counsel:

R. Clifford Fulford
FULFORD, POPE, NATTER DONOVAN & MULLINS
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81-2206

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v.

HOWARD LUTHER DICKERSON,
Respondent

Case Number 81-2206

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, by and through his undersigned attorneys, respectfully moves this Honorable Court to grant his Motion to Proceed in Forma Pauperis, and as grounds therefore states the following:

1. Respondent's Motion to Proceed in Forma Pauperis in the Eleventh Circuit Court of Appeals was granted by said Court, and Respondent was represented throughout his appeal to said Court by the undersigned attorneys.

R. Clifford Fulford
R. CLIFFORD FULFORD

Mark E. Hoffman
MARK E. HOFFMAN

Attorneys for Respondent

Address of Counsel:

R. Clifford Fulford
FULFORD, POPE, NATTER DONOVAN & MULLINS
2326 Highland Avenue
Birmingham, Alabama 35205
(205)252-8473

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon Charles Graddick and Elizabeth Ann Evans, by mailing a copy of same via United States mail, first class postage prepaid on this the 9th day of July, 1982.

R. Clifford Fulford
R. CLIFFORD FULFORD
Counsel